Supreme Court of the United States

OCTOBER TERM 1912

No. 337

LOUISVILLE & NASHVILLE RAILROAD CO.,
Appellant,

vs.

WESTERN UNION TELEGRAPH COMPANY,
Appellee.

BRIEF OF APPELLANT.

J. H. Orman & Son, Printers

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Supreme Court of the United States

OCTOBER TERM 1912

No. 769

LOUISVILLE & NASHVILLE RAILROAD CO.,
Appellant,

vs.

WESTERN UNION TELEGRAPH COMPANY,
Appellee.

BRIEF OF APPELLANT.

STATEMENT OF THE CASE.

This appeal is taken from a decree of the United States District Court for the Southern Division of the Southern District of Mississippi, sustaining a demurrer to, and dismissing a bill of complaint in equity, filed by the Appellant, the Louisville & Nashville Railroad Company, against Appellee, the Western Union Telegraph Company. The question raised by the demurrer was want of jurisdiction of the person of the Defendant. Rec. p. 37 (*57.)

The order allowing the appeal contains a certificate that the jurisdiction of the District Court was the only question determined by the decree from which the appeal was prayed, and is the only question presented for the determination of the Supreme Court upon such appeal, and it is the only question presented by the assignment of error. Rec. p. 38 (*59.)

Appellant (Complainant in the bill) is a corporation created by and organized under the laws of Kentucky, while Appellee (the Defendant in the bill) is a corporation created by and organized under the laws of New York. The

purpose of the bill is to enforce a claim by Appellant (Complainant) to the exclusive possession and use of its railroad rights of way in the Counties of Jackson, Harrison and Hancock, in the State of Mississippi, and to cancel, as clouds upon Appellant's title to such rights of way, three judgments obtained by Appellee in eminent domain proceedings purporting to confer upon Appellee the right to take possession of and use parts of Appellant's said rights of way. These rights of way are all situated in the judicial district and division in which the bill of complaint was filed. Rec. p. 1 (*2).

The contentions presented by the demurrers are:

1. That the bill of complaint could only be filed in the district whereof either the Complainant (Appellant), or Defendant (Appellee) was an inhabitant.

2. That Section 919 of the Code of Mississippi of 1906 is relied upon to confer jurisdiction, and that it did not confer jurisdiction upon any federal court.

3. For other reasons apparent. Rec. p. 36 (*54).

The propositions urged in the lower Court under this ground of demurrer were:

1st. That the judgments sought to be canceled are void upon the faces of the several proceedings in which they were rendered, and do not, therefore, constitute clouds upon Complainant's (Appellant's) title to its rights of way.

2nd. That each application for condemnation alleges in substance as follows:

> "Your petitioner further stipulates and agrees that if at any time in the future, after the erection of its poles, cross-arms and wires, it should become necessary for the said defendant to **change the location of its tracks or construct new tracks, or side-tracks,** where the same do not now exist, and for such purpose to use and occupy that portion of said right of way on which petitioner's poles are, or may be, set, cross-arms placed thereon, and wires strung, your petitioner will, at its own expense, upon reasonable notice from said defendants, remove said poles, cross-arms and wires **to such other point or points on said** defendant's right of way as shall be designated by said defendants." Rec. p. 30 (*45).

That under these allegations the use of Appellant's right of way cannot damage it, and that a muniment of title to the property of another that results in no damage does not constitute an incumbrance or cloud upon the title thereto.

Section 929 of the Code of Mississippi purports to confer upon telegraph companies the right to condemn parts of railroad rights of way for the construction of new telegraph lines. It reads as follows:

> "Telegraph and telephone companies, for the purpose of constructing new lines, are empowered to exercise the right of eminent domain, as provided in the chapter on that subject. And interurban street railways, for the purpose of constructing new lines between cities, towns or villages, may exercise the right of eminent domain as provided in the chapter on that subject, to condemn property between such cities, towns or villages."

The bill alleges that the proceedings were for the purpose of condemning a right of way for the continued maintenance of a line of telegraph, already existing upon such right of way, and that there was no law authorizing condemnation for such a purpose. Paragraph V of the bill of complaint, Rec. p. 3 (*4).

The procedure for such condemnation is prescribed by Chapter 43 of the Code of Mississippi, and Section 1856, which is part of Chapter 43, prescribes that the proceedings shall be commenced by presenting an application for such condemnation to the clerk of the Circuit Court of the county where the property sought to be condemned lies, and requires such clerk to endorse thereon the appointment of some competent justice of the peace to constitute, with a jury, a special court of eminent domain. The clerk is also required to fix a time and place for the organization of such court.

Section 1856 reads as follows:

> "When any person or corporation having the right so to do shall desire to exercise the right of eminent domain, he or it shall make application therefor in writing, and the owners of the property sought to be condemned and mort-

gagees, trustees, or other persons having an interest therein or a lien thereon, shall be made defendants thereto, which shall state with a certainty the right and describe the property sought to be condemned, showing that of each defendant separately. The application shall be presented to the clerk of the Circuit Court of the county, who shall indorse thereon his appointment of a competent justice of the peace of the county in which the property or some part thereof, is situated, to constitute, with a jury, the special court of eminent domain; and he shall fix the time and place in the county for the organization thereof."

The bill further shows that the application to condemn rights of way in Jackson and Harrison Counties were not presented to the clerks of the Circuit Courts of those counties, but to the deputy clerks, and that such deputy clerks—and not the clerks—made orders, appointing justices of the peace and fixing times and places for the organization of the eminent domain courts. Paragraph VII of the bill of complaint Rec. pp. 3 and 4 (*5 and 6).

In Hancock County the application was presented to the clerk of the Circuit Court and he made an order appointing a justice of the peace and fixing the time and place for the organization of the eminent domain court. Par. VII of the bill of complaint, Rec. p. 4 (*7). In each instance the order was made by a separate writing and was not endorsed upon the application. Par. VII of the bill of complain, Rec. pp. 3, 4, 5 (*5, 6, 7).

Subsequent to the making of these orders and before the organization of the eminent domain court under them, the clerks of the Circuit Courts of Jackson and Hancock Counties, each endorsed upon the application for condemnation in his county, a statement that he had previously made an order, appointing a justice and fixing a day for the organization of an eminent domain court and that he then made an endorsement upon the application to further evidence the making of such order. Par. VII of the bill of complaint; Rec. pp. 4 and 5 (*6 and 7). No such endorsement was made by the clerk of the Circuit Court of Jackson County.

The bill charges that the judgments in Jackson and Harrison Counties are void for the further reason that the deputy clerks had no power to appoint justices of the peace or fix the time and place for the organization of courts of eminent domain. Chapter 43 of the Code of Mississippi prescribes the exact form of the organization of the court; the charge to be given the jury; the verdict to be rendered by them; the form of their verdict, and of the judgment to be rendered by them. Par. IX of the bill of complaint; Rec. p. 10 (*15). These provisions are found in Sections 1862, 1865, 1866 and 1867, which are as follows:

"Section 1862. When an issue shall be ready for trial, a jury of twelve men shall be organized. Each party shall be allowed four peremptory challenges, and as many more as he can show cause for; and whatever is cause for challenge in the Circuit Court shall be cause in the special court. The alphabetical list of jurors shall be called in regular order until the jury shall be completed, or until it be exhausted; and if it be exhausted before a jury is obtained, the sheriff shall summon qualified jurors of the county from the bystanders until the jury be complete; but it shall be a cause of challenge to any person offered as a juror that he had, directly or indirectly, contrived to be summoned as such, or had come to any place that he might be so summoned. The jurors drawn who are not empaneled shall not thereby be discharged, if there be other issues to be tried, but shall remain in attendance on the Court. While being impaneled each juror may be sworn truthfully to answer all questions that may be propounded to him. **The justice of the peace shall not for any cause quash the proceedings or dismiss the court of eminent domain, but must proceed with the condemnation. No irregularity in drawing, summoning, or empaneling the jury shall vitiate the verdict or judgment, and no appeal or certiorari shall be allowed until after verdict by the jury.**" Par. XII of the bill of complaint; Rec. p. 14 (*21).

"Section 1865. The justice shall instruct the jury, in writing, in the followig words: 'The defendant is entitled to recover damages in this cause, and it devolves on you honestly and impartially to estimate the sum thereof, according to the evidence adduced on the trial, the weight

and credibility of which you are the sole judges. The defandant is entitled to due compensation, not only for the value of the property to be actually taken as specified in the application, but also for damages, if any, which may result to him as a consequence of the taking; and you are not to deduct therefrom anything on account of the supposed benefits incident to the public use for which the application is made.' The instruction shall be signed by the justice, be filed, and become a part of the record." Par. XII of the bill of complaint; Rec. p. 14 (*21).

"Section 1866. The verdict of the jury shall be in the following form: 'We, the jury, find that the defendant (naming him) will be damaged, by the taking of his property for the public use, in the sum of ------ dollars', and it shall be signed by each of them. In case an informal or unsigned verdict be returned, it may be amended. Upon the rendition of a verdict, the jurors, other than those selected from the bystanders, shall not be discharged if there be other issues to be tried." Par. XII of the bill of complaint; Rec. p. 14 (*21).

"Section 1867. Upon the return of the verdict, the Court shall enter a judgment as follows, viz:

"In this case the claim of (naming him or them) to have condemned certain lands named in the application, to wit: (here describe property), being the property of (here name the owner) was submitted to a jury composed or (here insert their names) on the ------ day of ------, A. D. ------, and the jury returned a verdict fixing said defendant's due compensation and damages at ------ dollars, and the verdict was received and entered. Now, upon payment of the said award, applicant can enter upon and take possession of the said property and appropriate it to public use as prayed for in the application. Let the applicant pay the costs for which execution may issue.' ------, J. P." Par. XII of the bill of complaint; Rec. p. 15 (*22).

Section 1871 of the Code of Mississippi authorizes an appeal to the Circuit Court. Under the laws of Mississippi, as construed by the Supreme Court of that State, the persons whose property is sought to be condemned has no right to be heard either in the eminent domain proceedings or upon an appeal therefrom upon any defense he may have to the proceedings. The sole question that can be determined in such

proceedings being the value of the property taken. If the property owner desires to defend against the taking of his property, he must do so by a bill in equity to cancel the judgment after it has been rendered. Par. XII of the bill of complaint; Rec. p. 15 (*22).

> Vinegar Bend Lumber Co. vs. Oak Grove & Georgetown R. R. Co., 89 Miss., 117; 43 Sou. Rep., 292.

Under this law, as so construed, Appellant (Complainant) further sought by its bill to cancel the several judgments complained of.

Under Sections 5263-5269, of the United States Compiled Statutes of 1901, Congress has prescribed the terms upon which telegraph companies may occupy the rights of way of post roads, and the bill of complaint alleges that Appellant's (Complainant's) railroad in the Counties of Jackson, Harrison and Hancock, in the State of Mississippi is a post road, and that the several states are excluded from granting to telegraph companies, rights of way over them—upon conditions other than those prescribed by Congress. The bill further seeks to cancel the judgments upon this ground. Par. XVI of the bill of complaint; Rec. p. 18 (*27).

Section 1868 of the Code of Mississippi of 1906 is part of the chapter of laws under which these proceedings were conducted and provides in part as follows:

> "Upon the return of the verdict, and entry of the judgment, if the applicant pay the defendant whose compensation is fixed by it, or tender to him the amount so found and pay the costs, he or it shall have the right to enter in and upon and take possession of the property of such defendant, so condemned and appropriate the same to the public use defined in the application."

Pursuant to this provision and to the forms of such judgment prescribed by the laws of Mississippi, each of the judgments attacked by the bill of complaint contain the following provisions:

"Now, then, upon payment of said award, applicant can enter in and upon said property and devote it to public use as prayed for in the application." Par. VIII of the bill of complaint; Rec. pp. 7 (*10), 8 (*12), 10 (*15).

The Appellee, the Western Union Telegraph Company, after it had obtained its judgments of condemnation, tendered to Appellant, the Louisville & Nashville Railroad Company, the amount of the award fixed by such judgment. Par. VIII of the bill of complaint; Rec. pp. 7 (*10), 8 (*12).)

The demurrer to the bill of complaint was as follows:

"Comes the Defendant, the Western Union Telegraph Company, for the special purpose and no other, until the question herein raised is decided, of objecting to the jurisdiction of this Court, by protestation, and confessing or acknowledging all or any part of the matters or things in said bill of complaint contained to be true, in such manner and form as the same are herein set forth and alleged, demurs to the said bill and for the cause of demurrer shows:

1. Because it appears from the face of the bill that neither the Plaintiff nor the Defendant is a citizen, resident or inhabitant of the southern division of the Southern District of Mississippi.
2. Because Section 919 of the Code of Mississippi set out and relied upon in said bill as conferring jurisdiction upon this Court does not confer jurisdiction and could not. The jurisdiction of this Court being determined by the Constitution and laws of the United States.
3. Because the said Section 919 applies only to the suits brought by residents of the State of Mississippi against foreign corporations in the State Courts and was not intended in any way to affect the jurisdiction of the Federal Courts, or suits brought therein.
4. For other reasons apparent."

Rec. p. 36 (*54).

The demurrer was sustained by the District Court and the cause dismissed for want of jjurisdiction. Rec. p. 37 (*56).

ASSIGNMENTS OF ERROR.

The following are the assignments of error:

"Comes the Louisville & Nashville Railroad Company, the Plaintiff in Error, by its counsel, and respectfully represents that it feels itself aggrieved by the proceedings and decree of the United States District Court for the Southern Division of the Southern District of Mississippi, made on the 9th day of July, 1912, and filed July 13, 1912, in the above entitled cause, and assigns error thereto as follows:

1. The Court erred in sustaining the demurrer to the bill of complaint, and in decreeing that it had no jurisdiction of said cause and dismissing the bill of complaint for want of such jurisdiction.

2. The Court erred in sustaining the demurrers to the bill of complaint and in decreeing that the bill of complaint by which said cause was commenced is not a bill to remove clouds from title to lands in the Southern Division of the Southern District of Mississippi, and that said Court has no jurisdiction over the defendant in said suits and that the bill of complaint be dismissed for want of jurisdiction.

3. The Court erred in sustaining the demurrer to the bill of complaint and in decreeing that the bill of complaint by which said cause was commenced is not a bill to remove clouds from title to lands in the Southern Division of the Southern District of Mississippi, and that defendant is not suable in this cause in said district or division, but is suable only in the district whereof it is an inhabitant, and in dismissing the bill for want of such jurisdiction."

ARGUMENT.

I.

THE BILL OF COMPLAINT WAS FILED TO ENFORCE A CLAIM UPON AND REMOVE CLOUDS FROM THE TITLE TO PROPERTY IN THE DISTRICT WHERE THE SUIT WAS BROUGHT.

Under the allegation of the bill of complaint, Appellant

claims the exclusive right to the whole of its said rights of way in Jackson, Harrison and Hancock Counties, in the State of Mississippi, while Appellee claims the right to take possession of, and use parts of each of them. Appellee claims this right under and by virtue of three judgments, which if valid, confers the right it claims. The bill of complaint asserts the validity of Appellant's claim and seeks to enforce it by having the incumbrance which said judgments purport to create upon Appellant's rights of way, cancelled and the clouds upon its title to its rights of way, created thereby removed.

The specific grounds of demurrer, numbered consecutively from 1 to 3, are readily disposed of.

The purpose of the bill of complaint, as already stated, was to enforce a claim by Appellant to its rights of way, situate within the division and district where the bill was filed and to cancel the judgments so as to remove the clouds created by them upon Appellant's title (Rec. pp. 1 and 2), and where there is diversity of citizenship, a case of this sort is properly filed in the district where the property is claimed, or upon which the cloud rests.

Greeley vs. Lowe, 155 U. S., 58.
Jellinik vs. Huron Copper Mining Co., 117 U. S., 9.
Citizens Savings & Trust Co. vs. Illinois Central R. R. Co., 205 U. S., 46.

The second and third demurrer rests upon the idea that the bill of complaint relies upon Section 919 of the Code of Mississippi to confer jurisdiction upon the Court. That section reads as follows:

"Any corporation claiming existence under the laws of any other state, or of any country foreign to the United States, found doing business in this State, shall be subject to suit here to the same extent that corporations of this state are by the laws thereof, liable to be sued by any resident of this state and also as far as relates to any transaction had in whole or in part within this state, or any cause of action arising here. And any corporation

having any transaction with persons or having any transactions concerning property situated within this state, through any agent whatever, shall be held to be doing business here, within the meaning of this section." Par. XV. of the bill of complaint; Rec. p. 17 (*25).

Section 920 of the Code of Mississippi reads as follows:

"Process may be served upon any agent of said corporation found within the county where the suit is brought, no matter what character of agent such person may be; and in the absence of an agent, it shall be sufficient to serve the process upon any person, if found within the county where the suit is brought, who represented the corporation at the time of the transaction out of which the suit arises took place, or if the agency through which the transaction was had be itself a corporation, then upon any agent of that corporation upon whom process might have been served if it were the defendant. The officer serving the process shall state the facts, upon whom isssued, etc., in his return, and service of process so made shall be as effectual as if a corporation of this state were sued, and the process has been served as required by law; but in order that defendant corporation may also have effectual notice it shall be the duty of the clerk to immediately mail a copy of the process to the home office of the corporation by registered letter, the postage and fees of which shall be taxed as other costs. The clerk shall file with the papers in the cause a certificate of the fact of such mailing, and make a minute thereof upon the docket, and no judgment shall be taken in the case until thirty days after the date of such mailing." Par. XV of the bill of complaint; Rec. p. 17 (*26).

It is, of course, conceded that neither these sections, nor any other law in the State of Mississippi can confer jurisdiction upon the Federal Courts. These particular statutes do not even attempt to confer jurisdiction upon the State Courts. They merely subject a foreign corporation to suit in any court held in Mississippi, having jurisdiction, whether the suit be by a resident or a non-resident of that state. They are only declaratory of the general rule previously recognized in Mississippi, that a foreign corporation doing business in a state

other than that of its creation is, in such other state, subject to suit, both by a resident or a non-resident of such state.

Pullman Palace Car Co. vs. Lawrence, 74 Miss., 782; 22 Sou. Rep., 53.

Under Section 919 of the Code of Mississippi a foreign corporation is merely located for the purpose of suit in Mississippi, and under Section 920 the method of service of process upon such corporation is prescribed.

Under Section 57 of the United States Judicial Code of 1912, no order fixing the method of serving process is necessary when the defendant is found within the district, but where the defendant is not found within the district the Court must make an order prescribing how service shall be had.

Section 919 of the Code of Mississippi is set out in the bill of complaint, not for the purpose of showing that the Court had jurisdiction of the cause, or of the parties, but only to show that the defendant could be found in Mississippi and process there served upon it, and that no order prescribing the method of service of process was, therefore, necessary.

The jurisdiction of the United States District Court, relied upon in the bill of complaint, and shown by appropriate allegations, rests upon diversity of citizenship and the enforcement of claims to, and the removal of clouds upon property.

Except in certain cases, a suit between citizens of different states must be brought in the district where either the plaintiff or defendant resides. If there was no exception to the general venue prescribed in suits where the jurisdiction depends upon diversity of citizenship, this suit could not have been maintained in the United States District Court for the Southern Division of the Southern District of Mississippi.

The general rule as to venue is prescribed by Section 51 of the judicial code of the United States of 1912, but by the express terms of that section, cases provided for by Section 57 of the United States Judicial Code of 1912, are excepted from the general rule. Section 51 of the Judicial Code provides, among other things, that:

"Except as provided for in the six succeeding sections, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

Section 57 of the Judicial Code is one of the six excepted sections, and provides that:

"When in any suit commenced in any district court of the United States to enforce any legal or equitable lien upon or claim, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks."

As the bill of complaint in this case is brought to establish Appellant's exclusive right to its rights of way, and to remove from its title thereto, the clouds created by the several eminent domain judgments complained of, the suit is properly brought in the district where the rights of way are situated.

In the case of Dick vs. Foraker, 155 U. S., 404, it is said:

"The suit was one to remove a cloud from the title to real estate situated in the district where the suit was brought. The defendant was a citizen of another state. The case was obviously within the jurisdiction of the court."

See also cases supra.

The several judgments rendered in the alleged eminent domain proceedings each purports to condemn Complainant's right of way, and authorize the defendant to enter upon and take possession thereof. Par. VIII of the bill of complaint; Rec. pp. 7 (*10), 8 (*12), 10 (*15). Each purports to operate as a grant to the Appellee, the Western Union Telegraph Company, of certain rights in Complainant's rights of way, and Complainant's only redress is by a bill in equity, to cancel or annul these judgments, and enjoin the exercise of the rights which they purport to grant or convey.

> Vinegar Ben Lumber Co. vs. Oak Grove & Georgetown R. R. Co., 89 Miss., 84; 43 Sou. Rep., 292, 298.

This case, therefore, clearly comes within the provisions of Section 57 of the United States Judicial Code of 1912, and the Court has jurisdiction both of the subject matter and of the parties to the suit.

II.

THE COURT COULD NOT DECLINE TO TAKE JURISDICTION BECAUSE THERE WAS NO EQUITY IN THE BILL OF COMPLAINT TO REMOVE CLOUDS.

The fourth ground of demurrer is "For other reasons apparent." Under this ground of demurrer it was urged that the bill of complaint shows that the several judgments complained of are void upon the faces of the proceedings in which they were rendered, and do not, therefore, constitute clouds upon Appellant's title to its rights of way; that void judgments do not constitute clouds upon title to property.

Also that the judgments and the taking thereunder would not injure Appellant.

In the case of Ladew vs. Tennessee Copper Co., 218 U. S., 357, 361, a bill was filed seeking to enjoin the defendants from operating furnaces, smelters and ovens in proximity to com-

plainant's timber lands, upon the ground that the fumes from defendant's plant would destroy the timber upon complainant's property, and the contention was that the right to have defendant so use its property so as not to injure complainant's property constituted a claim to that property within the meaning of the 57th section of the Judicial Code of the United States.

The Court, speaking through Mr. Justice Harlan, refused to sustain the contention and held the suit to be a mere personal action to abate a nuisance. This is probably the case relied upon to sustain the decree of the District Court. In that case Complainant made no claim of any kind to Defendant's property, nor did Defendant make any claim to Complainant's property. No instrument existed which purported to create any claim or right to the property of either party, and no claim was made thereto.

In the case of the Citizens Savings & Trust Co. vs. Illinois Central Railroad Co., 205 U. S., 46, the bill was filed by an Ohio corporation as a stockholder in "The Bienville Company," et al., to set aside certain leases and conveyances of the "Bienville Company," and for an accounting, and it was held that if the property purporting to have been conveyed or leased was in the district where the suit was brought, then the suit was properly brought and the Court had jurisdiction. The Court declined to consider whether the allegations of the bill entitled the Complainant to relief or not. Upon this subject the Court, on page 58, said:

> "We express no opinion upon the question whether, upon its showing, or in the event the allegations of the bill are sustained by proof, the plaintiff is entitled to a decree giving the relief asked by it. There was no demurrer to the bill as being insufficient in equity. The only inquiry now is whether, looking at the allegations of the bill, the suit is of such a nature as to bring it within the act of 1875, as one to remove incumbrances or clouds upon real or personal property within the district where the suit was brought, and, therefore, one local to such district."

In the case at bar, it is clearly shown that Complainant owns the rights of way, subject to such interest therein, if any, as were created by the judgments complained of; that the Defendant claims a right to the possession and use of parts of Complainant's rights of way under and by virtue of such judgments. The bill seeks to cancel these judgments as clouds upon Complainant's title and to enforce and protect its claim to the exclusive use of its entire rights of way.

~~If we concede~~ Defendant's contention, IS that under the allegations of the bill, the judgments under which Defendant claims a right to the possession and use of parts of Complainant's rights of way, are void upon the faces of the proceedings under which they were rendered and that the judgments do not, therefore, constitute clouds upon Complainant's title. We discuss this question fully hereafter, but even if it justified the dismissal of the bill for want of equity, it would not deprive the District Court of jurisdiction.

When the bill was filed and the jurisdiction of the Court questioned, upon the ground that the bill was not a bill to enforce a claim or remove a cloud from property, the Court was confined to this inquiry—What is the purpose of the bill? It could not inquire whether the allegations of the bill entitled Complainant to the relief sought.

If, upon an examination of the bill, the Court had found that it was not the purpose of the bill to enforce a claim or remove a cloud, the Court should have declined to take jurisdiction as the Court did in the case of Ladew vs. Tennessee Copper Company. If, on the contrary, such appeared to be the purpose for which the bill was filed, the Court was obliged to take jurisdiction of the cause before it could determine whether the allegations of the bill were sufficient to entitle the Complainant to relief, and had the demurrer attacked the bill upon the ground that it contained no equity to cancel the judgments complained of, as clouds upon Appellant's title, because the allegations of the bill showed that such judgments were void upon their faces, the Appellee would have thereby waived the want of jurisdiction in the Court.

Western Loan & Savings Co., vs. Butte & Boston Consolidated Mining Co., 210 U. S., 368.
Texas Co. vs. Central Fuel Oil Co., 194 Fed. Rep., 1, 9.

If, then, the demurrer presented the question of want of equity in the bill, to cancel the judgments as clouds upon the title, the question of jurisdiction was waived; if, on the other hand, the demurrer did not raise that question, then that question was not before the Court.

III.

THE BILL OF COMPLAINT WAS NOT, HOWEVER, WITHOUT EQUITY.

The three judgments were attacked by the bill of complaint upon a number of grounds common to each of them, and the judgments in Jackson and Harrison Counties were further attacked upon the ground that the appointments of the justices of the peace for the organization of the eminent domain courts were not made by the respective clerks of the Circuit Courts in these counties, but by their deputies. Appellee claimed that for this reason the Jackson and Harrison County judgments are void upon the faces of the respective proceedings in which they were rendered and do not, therefore, constitute clouds upon Appellant's title to its rights of way and that under the allegations of the bill the invalidity of each judgment is also apparent upon the face of the eminent domain proceedings, because of the unconstitutionality of the eminent domain laws of Mississippi. These contentions are addressed to the equity of the bill and could not be made without waiving the question of jurisdiction which was the sole question before the Court at the time it rendered the decree that is complained of, but if the Defendant's could, without waiving the question of jurisdiction, attack the equity of the bill such attack could not be successfully made.

Under the laws of the State of Mississippi, no opportunity is offered the property owner to be heard during the progress

of the eminent domain proceedings upon any defenses he may have to the condemnation of his property. This alone is probably not a good ground of attack upon the judgments as having been obtained without due process of law, for under the decisions of the Supreme Court of Mississippi, all defenses to the condemnation proceedings can be subsequently set up in a bill in equity such as was filed in this case, to annul the judgments and enjoin an entry under them.

Vinegar Bend Lumber Co. vs. Oak Grove & Georgetown R. R. Co., 89 Miss., 84; 43 Sou. Rep., 292, 296.

The right to set up in a bill in equity any defenses that the land owner may have to the eminent domain proceedings, is the only thing that prevents such proceedings from operating to take the property of the land owner without due process of law.

Freedland vs. Williams, 131 U. S., 405.

It is necessary to due process of law that at some stage the complaining party shall have an opportunity to be heard in some regularly established proceedings.

Simon vs. Craft, 182 U. S., 427, 437.
American Land Co. vs. Zeiss, 219 U. S., 47.
Appleby vs. Buffalo, 221 U. S., 524, 532.
Twining vs. New Jersey, 211 U. S., 78, 111.

Under the decisions of the Supreme Court of Mississippi, binding upon this Court, the right to challenge the eminent domain proceedings by a bill in equity is inherent in and a part of the statutory authority to exercise the right of eminent domain and is essential to the constitutionality of the chapter of the Code on eminent domain.

Vinegar Bend Lumber Co., vs. Oak Grove & Georgetown R. R. Co., 89 Miss. 84, 43 So. 299.

In this case the Court holds that except for the right to file a bill in equity, and set up any defenses that the land owner may have against the condemnation of his property, the chap-

ter of the Code of Mississippi upon eminent domain would not afford due process of law, and would be void upon its face.

The general, but not the universal, rule is that equity will not entertain jurisdiction to cancel as a cloud upon title an instrument that is void upon its face. In some states the rule is qualified so as not to apply to cases where it requires legal learning and acumen to determine whether the instrument is upon its face valid or void.

Merchant's Bank vs. Evans, 51 Mo., 335.
Pollibain vs. Reverly, 81 Sou. West., 182.
Mining Co. vs. Coyne, 147 Sou. West, 148.
Perkins vs. Baer, 68 Sou. West, 939.
Verdin vs. St. Louis, 33 Sou. West, 480.

In other jurisdictions the rule is repudiated in its entirety.

Schofield vs. City of Lansing, 17 Mich., 437.
Day Land Co. vs. State, 4 Sou. West, 865.
3 Pomeroy's Equity Jurisprudence, Section 1399.

Upon this last proposition, authorities might be multiplied, but the proposition itself is not deemed material to this discussion.

In other states the rule is changed by statute. This is the case in New Jersey and Mississippi.

In New Jersey, the statute reads as follows:

"When any person is in peaceable possession of lands in this state, claiming to own the same, and his title thereto, or to any part thereof, is denied or disputed, or any person claims or is claimed to own the same, or any part thereof, or any interest therein, or to hold any lien or encumbrance thereon, and no suit shall be pending to enforce or test the validity of such title, claim or encumbrance, it shall be lawful for such person so in possession to bring and maintain a suit in chancedy to settle the

title to said lands, and to clear up all doubts and disputes concerning the same.

Section 550 of the Code of Mississippi, of 1906, relates to the same subject matter, and reads as follows:

> "When a person, not the rightful owner of any real estate, shall have any conveyance or other evidence of title thereto, or shall assert any claim, or pretend to have any right or title thereto, which may cast doubt or suspicion on the title of the real owner, such real owner may file a bill in the Chancery Court to have such conveyance or other evidence or claim of title canceled, and such cloud, doubt or suspicion removed from said title, whether such real owner be in possession or not, or be threatened to be disturbed in his possession or not, and whether the defendant be a resident of this state or not; and any person having the equitable title to land may, in like cases, file a bill to divest the legal title out of the person in whom the same may be vested, and to vest the same in the equitable owner."

In the case of Bogert vs. City of Elizabeth, 27 New Jersey, Equity, page 568, the owner of a lot of land filed a bill to cancel a conveyance of his property made under a sale for the payment of a paving assessment, upon the ground that the proceedings under which the sale was made were illegal and void. The Court first discussed the proceedings under which the sale was made, and concluded the discussion as follows:

> "It is consequently clear that the sale of the complainant's land was an empty form, and passed no title to the city."

The Court then discussed the conflict between the Courts as to whether a Court of Equity will cancel an instrument which is void upon its face, for the purpose of removing a cloud upon the title to property, and then says:

> "In the case now before this Court the illegality of this sale and of all the proceedings leading to it is, at first

view, so conspicuous, that if, in this state, the question of the jurisdiction of the Court had to be decided from consideration derived from general principles, it is easy to see that a conclusion could not be reached without difficulty. But this is not the case, for the inquiry is controlled by the act to quiet titles, passed March 2, 1870."

The Court then quotes the act which is set out above and proceeds as follows:

"The object of this enactment, I think, is obvious: it was to extend the jurisdiction of the Court of Equity over the class of cases embracing the present one. Unless this was the design, I am at a loss to assign to it any office, for the jurisdiction of the Court, to the extent of the English and New York rule, could not have been deemed in doubt. The act is plainly remedial, and its language is very comprehensive, and in my judgment it should be construed to give jurisdiction in every case in which any claim or lien upon real estate appears to be asserted, or to exist. It is highly desirable that land should be freed from every lurking and unsubstantial claim, for even the suspicion of such claim, no matter how ill-founded, affects the value of the property when on sale. The policy which the statute is designed to promote is beneficial and enlightened, and it should be received with favor. It provides adequate checks against abuse, for it declares that if the defendant shall suffer a decree pro confesso to be taken, such decree shall not carry costs; and if he shall deny that he claims any interest or encumbrance in the premises, he shall be entitled to costs. I cannot see why under these safeguards against vexation, an owner of land should not have the privilege, in every imaginable case, of putting to the test, everything which presents a suspicious appearance against his title. The sale in the present case was impressive by being made under a city ordinance, conducted by official authority, and in the course of a procedure presenting, to the unprofessional eye, the ordinary marks of legality. Its effect, I cannot doubt, would be to detract, in a considerable degree, from the market value of the land. In my opinion, the statute in question can have no more appropriate use than in its application to this situation."

In the case of Cook vs. Friley, 61 Miss., page 1, a bill to remove a cloud was filed, and the Court said:

"If the complainant is the real owner of the land, and the defendant either has any evidence of title thereto, or asserts any claim or pretends to have any right or title thereto, which may cast doubt or suspicion on the title of the real owner, such real owner may exhibit his bill against such person to have such evidence of title canceled or the cloud, doubt or suspicion removed from the title.

The statute 1833, of the Code of 1880, not only authorizes the real owners to file his bill to cancel a paper title, but also to remove the cloud, doubt or suspicion which may spring from the assertion of claim or pretense of right or title thereto by the defendant, who without any muniment of title may assert a claim or pretend to have right or title. The purpose was to give the real owner a remedy against one who asserts any claim or pretends to have any right or title to such owner's land, in analogy to the right of action by the canon law for jactitation of marriage. The real owner is entitled to protection against jactitation of title to the disparagement of his real ownership. He may bring into court one who asserts any claim or pretends to have any right or title to his land, and require him to vindicate his claim or submit to its extinguishment by decree of the Court. The defendant in such case must maintain his claim or right, or it will be disposed of by decree against him. If he disclaims all right or title, it is a mere question of costs. If he asserts a claim or right as to the land, its validity will be passed on by the Court. All that the complainant need aver is that he is the real owner, and that the defendant is not, but asserts claim or pretends to some right to his land so as to cast doubt or suspicion on his title, which he seeks to have disposed of as a cloud on his title—clearing it by decree of the Court."

In the case of the Peoples Bank of New Orleans vs. West, 67 Miss., 729; 7 Sou. Rep., 516, an attachment was levied and the property sold thereunder, and the deed made to the purchaser was attacked by a bill in equity upon the ground that the attachment proceedings were void, and the deed made

thereunder, a cloud upon the owner's title.

The Court discussed the validity of the attachment proceedings and reaches the conclusion that they were void and then concludes as follows:

> "When the complainant shows a perfect title, legal or equitable, and the title of the defendant is shown to be invalid, it is, in the nature of things, a cloud upon the title of complainant and should be canceled."

In the case of Drysdale vs. Biloxi Canning Factory, 67 Miss., 534; 7 Sou. Rep., 541, the property had, as in the last case, been levied on under attachments and sold, and the bill was filed to cancel the deed thereto as a cloud upon the title to the property.

The Court discusses the irregularity of the attachment proceedings, and holds that they were void and the deed a cloud upon the title, as follows:

> "The flagrant disregard of these plain statutory requirements, designed to give a non-resident defendant notice of the pendency of an attachment suit against him, must be held to vitiate and nullify all subsequent proceedings in the causes. Without any former adjudications on this point (and there are several in our reports) it seems incredible, almost, that any sane suitor should begin proceedings under our attachment laws, and hope to win in a legal contest, in despite of his gross neglect of the simplest and plainest provisions of the statutes on the subject of attachments. From the record, as it appears here, the appellant was entitled to have the relief prayed in his bill."

See also:

Hurley vs. Board of Miss. Levee Commission, 76 Miss., 141; 23 Sou., 580.

Gambrill & Co. vs. Saratoga Lumber Co., 87 Miss., 773; 40 Sou., 485.

Vinegar Bend Lumber Co. vs. Oak Grove & Georgetown R. R. Co., 89 Miss., 84; 43 Sou. 299.

It follows that under the influence of the Mississippi stat

ute an instrument void upon its face, or a mere claim that could not be enforced in any court may be annulled and cancelled as a cloud upon the owner's title; and when under the statute of a state a property owner has the right to resort to a state court of equity to cancel an instrument which is void upon its face, he also has the right to resort to a Federal Court of Equity for the same purpose if the other jurisdictional elements are present.

In the case of Reynolds vs. Crawfordsville Bank, 112 U. S., 405, a bill was filed to cancel a certain deed as a cloud upon the complainant's title and it was found by the Court, among other things, that the deed was "wholly inoperative, null and void," and a cancellation of it as a cloud upon complainant's title was decreed. An appeal was taken from this decree and the Supreme Court of the United States, on page 409, et seq., said:

> "The appellant next complains of the decree rendered by the Circuit Court, and his first objection is, that the Court had no jurisdiction to quiet the title of the appellee as against a deed averred by the bill and not denied by the answer to be void on its face. The contention is that a deed, void on its face, is not a cloud upon the title, and a claim of title under it is no ground for the interference of a court of equity. This objection is not tenable. It may be conceded that the Legislature of a State cannot directly enlarge the equitable jurisdiction of the Circuit Courts of the United States. Nevertheless an enlargement of equitable rights may be administered by the Circuit Courts as well as by the courts of the States. Broderick's Will, 21 Wall, 503, 520. And, although a State law cannot give jurisdiction to any Federal Court, yet it may give a substantial right of such a character, that when there is no impediment arising from the residence of the parties, the right may be enforced in the proper Federal tribunal, whether it be a court of equity, admiralty, or common law. Ex parte McNeil, 13 Wall., 236, 243.
>
> While, therefore, the courts of equity may have generally adopted the rule that a deed, void upon its face, does not cast a cloud upon the title which a court of equity would undertake to remove, we may yet look to the

legislation of the State in which the Court sits to ascertain what constitutes a cloud upon the title, and what the State laws declare to be such the Courts of the United States sitting in equity have jurisdiction to remove this was expressly held in the case of Clark vs. Smith, 13 Pet., 195, 203, where it was said by this Court: 'Kentucky has the undoubted power to regulate and protect individual rights to her soil and to declare what shall form a cloud on titles; and having so declared, the Courts of the United States, by removing such clouds, are only applying an old practice to a new equity created by the Legislature.'

The State of Indiana, where the present case arose, has declared by statute what kind of a claim against real estate is such a cloud upon the title as will support a suit to remove it. 1070 Rev. Stat. of Indiana, 1881, provides as follows: 'An action may be brought by any person, either in or out of possession, or by any one having an interest in remainder or reversion, against another who claims title to or interest in real property adverse to him, although the defendant may not be in possession thereof, for the purpose of determining and quieting the question of title.'

This act confers upon any one, against whom another, whether in or out of possession, claims an adverse title or interest in real estate, the substantial right of having the disputed title settled by action of the Courts.

Under this statute it has been decided by the Supreme Court of Indiana that it is sufficient to aver that the defendant claims some interest or title, or pretended interest or title, adverse to complainant, without stating what the title is. Marot vs. The Germania Building Association, 54 Ind., 37; Jeffersonville &c. R. R. Co., vs. Oyler, 60 Ind., 383.

The bill of complaint in this case complies with this rule by averring that 'said Reynolds is, under his deed' (from Baird, the assignee), 'claiming and asserting title paramount to the title of this complainant;' and the answer to the defendant admits that, under the deed executed to him by Baird, he is claiming whatever title to said lands the same confers on him.

The question whether, under such a statute as that of Indiana and under the facts stated, the Circuit Court had jurisdiction to render the decree complained of, has been, in effect, decided in the affirmative by this Court in the

case of Holland vs. Challen, 110 U. S., 15.

In that case, a statute of Nebraska was under review, which provided that 'an action may be brought and prosecuted to final decree by any person, whether in actual possession or not, claiming title to real estate against any person who claims an adverse interest therein, for the purpose of determining such interest and quieting the title.' The Court, speaking by Mr. Justice Field, declared in substance that this statute dispensed with the general rule of courts of equity, that, in order to maintain a bill to quiet title, it was necessary that the party should be in possession, and, in most cases, that his title should be established at law or founded on undisputed evidence or long continued possession.

If the equity courts of the United States in Nebraska could dispense with these well-established rules of equity, and administer the rights conferred by this statute, it is not open to question that, in this case, the Circuit Court could disregard a similar rule, and entertain jurisdiction of the appellee's case, and accord to him the rights conferred by the statute law, even though the deed under which the appellant claimed was void on its face.

As the same statute authorizes the Court to take cognizance of the case even when the title of defendant amounts to more than a mere cloud, and applies in every case when the defendant claims an adverse interest in or title to the property in controversy, it is clear that the assignment of error under consideration has no support."

In the case of Cowley vs. Northern Pacific Railroad Company, 159 U. S., 583, the Court says:

"Although the statute of a State or territory may not restrict or limit the equitable jurisdiction of the Federal Courts, and may not directly enlarge such jurisdiction, it may establish new rights or privileges which the Federal Courts may enforce on their equity or admiralty side, precisely as they may enforce a new right of action given by statute upon their common law side. Thus in ex parte McNeil, 13 Wall., 236, a statute of the State of New York giving to the pilot, who first tendered his services to a vessel, and was refused, a right to half pilotage, was held to be enforceable upon the admiralty side of the District Court. See also the cases of Broderick's Will, 21 Wall.,

503, 520, and Clark vs. Smith, 13 Pet., 195, 203. So in Reynolds vs. Crawfordsville Bank, 112 U. S., 405, a bill in equity under a statute of Indiana, which averred that a deed was void upon its face, was held sufficient to support the jurisdiction of the Circuit Court of the United States in that district, to quiet the title of the complainant as against such deed, although courts of equity had generally adopted the rule that a deed void upon its face does not cast a cloud upon the title, which a court of equity will undertake to remove. It was also said in Davis vs. Gray, 16 Wall., 203, 231, that 'a party by going into a national court does not lose any right or appropriate remedy of which he might have availed himself in the State courts of the same locality. The wise policy of the Constitution gives him a choice of tribunal.' Other cases to the same effect are Holland vs. Challen, 110 U. S., 15; Marshall vs. Holmes, 141 U. S., 589; Johnson vs. Waters, 111 U. S., 640; Arrowsmith vs. Gleason, 129 U. S., 86."

To the same effect, see:

Chapman vs. Brewer, 114 U. S., 158.
Moore vs. Steinback, 127 U. S., 70.

It is submitted, therefore, that even if the District Court could, under a demurrer to the jurisdiction, have considered the question as to whether or not the bill contained equity, still the decree dismissing the bill for want of jurisdiction would have been errorenous as the bill contained equity to remove the cloud from Complainant's right of way in each of the counties.

Each application for condemnation alleges substantially as follows:

"Your petitioner further stipulates and agrees that if at any time in the future, after the erection of its poles, cross-arms and wires, it should become necessary for the said defendant **to change the location of its tracks, or construct new tracks, or side-tracks,** where the same do not now exist, and for such purpose to use and occupy that portion of said right of way on which petitioner's poles are, or may be, set, cross-arms placed thereon, and wires

strung, your petitioner will, at its own expense, upon reasonable notice from said defendants, remove said poles, cross-arms and wires to such other point or points on said defendant's right of way as shall be designated by said defendants." Rec. p. 30 (*45).

Appellee contends that under such allegation no injury can accrue to Appellant from the taking of its property, and that Appellant is, therefore, without remedy against such taking.

As heretofore pointed out, the only protection Appellant has under the laws of Mississippi against the taking of its property without due process of law and without just compensation, is by bill in equity, such as Appellant has filed in this case. Section 17 of the Constitution of Mississippi provides that:

> "Private property shall not be taken, or damaged, for public use, except on due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law; and whenever an attempt is made to take private property for use alleged to be public, the question whether the implicated use be public shall be a judicial question, and, as such, determined without regard to legislative assertion that the use is public."

The first section of the Fourteenth Amendment of the Constitution of the United States provides that:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law."

In the face of these provisions Appellant contends that unused property can be taken for and devoted to public use, without just compensation and without due process of law, so long as the owner has no present use for it. The contention is untenable upon its face. Under it, vacant buildings could be taken and occupied for municipal purposes without just compensation and without due process of law.

Besides, under Section 550 of the Code of Mississippi hereinabove set out, the right to cancel the instrument or claim is given without regard to the damage resulting therefrom.

Hurley vs. Board of Miss. Levee Com'rs., 76 Miss. 141; 23 Sou., 580.
Can. Pac. vs. Moosehead Tel. Co., 76 Atl. R., 885.
Hyde vs. Minn., D. & C. P. R. R. Co., 123 N. W., 849
Spurlock vs. Dornan, 81 S. W., 412.

Appellee does not, however, in its several applications for condemnation, offer to vacate the property **whenever desired by Appellant for other use.** It only offers to "remove said poles, cross-arms and wires to such other point or points on defendant's right of way as shall be designated by defendants," and this only, should it become necessary for Appellant to change the location of its track, or construct new tracks or side-tracks where the same do not now exist, and for such other purpose to use and occupy that portion of said right of way at which petitioner's poles are, or may be set. It does not offer to so remove its appliances, should Appellant desire to use the portion of the right of way occupied by such appliances for telegraph purposes, or for any other use incident to the operation of a railroad, nor does it offer to remove its appliances in any event, except to some other point on Appellant's right of way.

Further discussion of this proposition is not deemed necessary.

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Supreme Court of the United States.

OCTOBER TERM, 1913.

No. 337.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
Appellant,

vs.

THE WESTERN UNION TELEGRAPH COMPANY,
Appellee.

BRIEF FOR APPELLEE.

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In the Supreme Court of the United States,

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BRIEF FOR WESTERN UNION TELEGRAPH COMPANY.

Jurisdiction.

This case was heard in the court below on a special demurrer for want of jurisdiction (Record, pp. 36, 37). No other question was presented, or argued, or decided there, the point being that the court did not have jurisdiction of the parties. It was insisted on the hearing and in support of the demurrer that while the bill alleged that it was a bill to remove *cloud* this averment was a mere pretext to obtain jurisdiction, because all of the objections and grounds set up in the bill attacking the validity of the condemnation proceedings as being void, if correct, were aimed at the defects appearing on the face of the proceedings attacked. In other words, that if the proceedings were void, as claimed in the bill, they were void on their face, and therefore constituted no cloud and therefore the court had no jurisdiction; that the federal

statutes, Section 57 of the Judicial Code of the United States, under which the bill was admittedly drawn localizing certain actions, restricted those actions to suits to enforce liens upon or claims to property or *to remove encumbrances or liens or clouds upon title*, and that what constitutes clouds upon title has a well settled and defined legal meaning and signification, and that it is settled that an instrument void on its face, as shown by the bill of complaint, constitutes no cloud and that in such a case a court of equity has no jurisdiction.

See

Peirsoll vs. Elliott, 6 Pet., 95.
Devine vs. Los Angeles, 202 U. S., 313.
Phelps vs. Harris, 101 U. S., 370.
Mackall vs. Casilear, 137 U. S., 556.
Lyon vs. Alley, 130 U. S., 177.
Hannewinkle vs. Georgetown, 15 Wall., 547.

It is admitted by the appellant that the general rule is as stated, that is to say, that an instrument void on its face constitutes no cloud (Appellant's Brief, page 28). But it is sought to avoid the force of this general rule by the claim that by statute of the State of Mississippi and the decisions rendered construing this statute, a court of equity will entertain a bill for the cancellation as a cloud an instrument void on its face.

The contention of the appellee is that while the jurisdiction of the court is somewhat enlarged by the Mississippi statute, no case can be found in Mississippi holding that, where it appears from the bill of complaint either by its allegations or from the instrument itself which is made a part of the bill, that the instrument sought to be canceled is void upon its face, the court of equity will take jurisdiction. On the contrary, there is nothing in the Mississippi cases which indicates any purpose to abrogate or depart from the general rule, as we will endeavor to show later.

It is well enough here to call attention to the fact that counsel for the appellant in their brief refer to the *judgment* in the condemnation proceedings as being the thing attacked, as if it were a separate and distinct record or instrument. Under the statate of Mississippi, the judgment is but a part of the condemnation proceedings and the condemnation proceeding *as a whole*, including the judgment, is made the muniment of title and the record.

Section 1873, chapter 43 of the Code of Mississippi of 1906 is as follows:

> "After all the issues are tried and all proper entries are made, the record shall be signed by the justice and certified to be correct, *and the whole shall be filed in the office of the clerk* of the circuit court and shall remain as a record thereof. * * * Any person interested in such record may obtain a certified copy thereof from the circuit clerk and have the same recorded in the records of deeds."

In other words, under this statute, the muniment of title, is the entire record, and not a segregated part thereof, and the entire record stands in the nature of a deed and is recorded as such in the record of deeds. Our purpose in calling the court's attention to this point is to avoid the idea or impression that the court might have that the judgment was a separate instrument or document, apparently valid on its face, and resort must be had to the proceeding as evidence *aliunde* showing the invalidity of the judgment as in the case of a sheriff's deed or a tax deed based upon a void proceeding which does not constitute a part of the deed and which must be resorted to as evidence outside of the deed to show its invalidity. This is not the case. The entire proceeding, including the judgment, the form of which is prescribed by law, Section 1867, Code of Mississippi of 1906, is the record as we have shown above, and is recorded in the record of deeds as the muniment of title. No execution *except for costs* issues on this judgment or is contemplated. The amount of damage is fixed by it, and may be paid or not by the applicant.

We will now review the Mississippi cases. The Mississippi statute invoked by counsel for appellant is a very old statute, and appears unchanged in every published Code of the State, and there are many decisions bearing on this statute, but those which bear upon the particular question here presented are the ones to which we direct the court's attention.

In the case of Boyd vs. Thornton, 13 S. & M., Miss., decided in 1850, at page 344, speaking of this statute, the court says:

> "The statute is very broad and seems to authorize the true owner in all cases to apply to a court of

chancery for its assistance against any one who may have a deed, or other *evidence* of title which may form a cloud or may cast a shadow of doubt or suspicion on the title of the owner. Hutchinson's Code, 773. In terms it may seem to confer power on the court of chancery to try the strength of title in all cases, and thus to dispense with the well-known remedy at law by action of ejectment. For the present we shall not criticize the power of the legislature in this respect. In making an application of the statute, however, we must keep in view certain established principles which prevail in the administration of equity jurisprudence and hold that they are not abolished by the statute."

In Huntington vs. Allen, 44 Miss., decided in 1870, at page 662, the court says, referring to this statute and the question of jurisdiction:

"The jurisdiction takes its rise in the doctrines of *quia timet,* in order to give repose and peace to the party in possession, by virtue of a rightful claim or title against him who might vex or harass with suits after the right had been fairly tested in a court of law, or against a deed or evidence of title, which had been fraudulently obtained, and which might be set up after the evidence which could manifest its true character had become obscure, or had passed away. The terms used in the statute, expressive of the scope of the jurisdiction, viz.: '*cloud,*' '*doubt,*' '*suspicion,*' *quite distinctly imply that the instrument which creates them, is apparent rather than 'real'; is 'resemblance' rather than substance; obscures rather than destroys or defeats.*"

In Carlisle vs. Tindall, 49 Miss., at page 233, decided in 1873, the court said:

"The enlarged jurisdiction conferred by the statute (Code of 1871, Section 975) upon the chancery court, at the suit of the 'real owner,' to remove the 'cloud,' 'doubt' or suspicion, cast by 'a deed or other evidence of title,' upon the true title, must be considered in the light and by the aid of the doctrines of a court of equity, as applied to such *quia timet* bills."

"The statute gives the jurisdiction to the 'real owner,' whether he be in possession, or threatened to be disturbed in his possession."

"It has not yet been exactly defined within what limits the jurisdiction may be exercised. It could not have been designed to draw into a court of equity contestation about the relative value and merits of legal titles, so as to oust the court of law and jury of the right to try legal titles, especially if a suit were already pending at law. But in every case the complainant who comes into court upon a legal title must be prepared to show its validity, and that the opposing deed or other evidence, or pretense of title, is only *apparently* but not substantially efficient to overcome it."

The court cites in this case Boyd vs. Thornton, Huntington vs. Allen, *supra*.

In the case of Phelps vs. Harris, 51 Miss., decided in 1875, at pages 793, 794, the court says:

"Bills to remove a cloud from a title may fall under the head of relief, *quia timet*; they may occasionally be properly classed under bills for the surrender and cancellation of void instruments. The principle upon which these bills are based is simply that it is inequitable that a party in possession should be embarrassed by having hanging over him a hostile claim, which, although not actively asserted and not of any validity, is nevertheless calculated to affect the marketability of the title. * * *

"There can, however, be no doubt that a court of chancery has the undoubted right to have deeds or other evidence of title, constituting a cloud, doubt or suspicion over the title of the rightful owner of any real estate in this state, canceled, and such cloud, doubt or suspicion thereby removed, in a case properly before it for that purpose."

The court cites Huntington vs. Allen, *supra*, and Ezelle vs. Parker, 41 Miss., 526 and 527.

In Railroad Co. vs. Neighborn, 51 Miss., 412, decided in 1875, at page 421, the court says:

"A court of equity always had the jurisdiction to protect the title of the 'true owner in possession,' against adversary deeds and instruments, which had been obtained by fraud, and which might (after the evidence which would expose their true character, had

become obscure or faded away) be set up to vex and endanger the 'true owner'.

"The statute enlarges the principle so as to extend its benefits to the 'real owner', whether in possession or not, so that he may apply for the cancellation of *deeds* and other *evidences of title* which constitute a cloud upon his own title."

The court in this case cites Boyd vs. Thornton, Huntington vs. Allen and Carlisle vs. Tindall, *supra*.

In Griffin vs. Harrison, 52 Miss., decided in 1876, at page 896, the court says:

"The rules by which this case must be determined are chiefly laid down in Huntington vs. Allen, 44 Miss., 654: 'The statute in reference to the removal of clouds from titles enlarges the principle upon which courts of equity were accustomed to administer relief. It is very broad—allowing the real owner, in all cases, to apply for the cancellation of a *deed*, or other EVIDENCES of title, which casts a cloud or suspicion on his title. It is an ancient and well established rule, both in courts of law and equity, that a party must recover on the strength of his own title, and not on the weakness of his adversary.' The principle is very aptly stated in Banks vs. Evans, 10 S. & M., 62. 'He who comes into equity to get rid of a legal title, which is alleged to overshadow his own title, must show clearly the validity of his own title, and the invalidity of his opponent's.' Nor will equity set aside a legal title on a doubtful state of case. In further exposition of the same principle, it was declared in Boyd vs. Thornton, 13 S. & M., 344, 'the complaint must be prepared to sustain the entire fairness of his own title.' Tested by the rules thus declared, how stands the case at bar? The complainant shows a sale, a forfeiture, to the state for taxes in 1847. There is in the bill an allegation of redemption in 1848, but this is denied and there is no evidence in support of it. This casts a doubt upon the title of the complainants within the rules quoted from Huntington vs. Allen."

The case of Phelps vs. Harris, *supra*, was appealed from the Supreme Court of the State of Mississippi to this court, and is reported in 101 U. S., page 370. At page 375, this

court, having then under consideration the Mississippi statute, said:

> "'Those only', said Justice GRIER, 'who have a clear legal and equitable title to land connected with possession, have any right to claim the interference of a court of equity to give them peace or dissipate a cloud on the title' (Orton vs. Smith, 18 How., 263, and see Ward vs. Chamberlain, 2 Black, 430, 444; West vs. Schnebly, 54 Ill., 523; *Huntington vs. Allen, 44 Miss., 654;* Stark vs. Starrs, 6 Wall., 402). And as to the defendant's title, if its validity is merely doubtful, it is more than a cloud, and he is entitled to have it tried by action at law; and if it is invalid on its face, so that it can never be successfully maintained, it does not amount to a cloud, but may always be repelled by an action at law (Overing vs. Foote, 43 N. Y., 290; Meloy vs. Dougherty, 16 Wis., 269). Justice STORY says: 'Where the illegality of the agreement, deed or other instrument appears upon the face of it, so that its nullity can admit of no doubt, the same reason for the interference of courts of equity, to direct it to be cancelled or delivered up, would not seem to apply; for, in such a case, there can be no danger that the lapse of time may deprive the party of his full means of defense; nor can it, in a just sense, be said that such a paper can throw a cloud over his right or title, or diminish its security; nor is it capable of being used as a means of vexatious litigation, or serious injury.' 2 Eq. Jur., Sec. 700, *a*.
>
> "The Supreme Court of Mississippi, in their opinion in the case between the present parties, which is reported in 51 Miss., 789, say: 'This jurisdiction of equity cannot properly be invoked to adjudicate upon the conflicting titles of parties to real estate. That would be to draw into a court of equity from the courts of law, the trial of ejectments. He who comes into a court of equity to get rid of a legal title which is allowed to cast a shadow on his own title, must clearly show the validity of his own title, and the invalidity of his opponent's. Bank vs. Evans, 10 S. & M., 35; Huntington vs. Allen, 44 Miss., 662.'"

The Mississippi cases which we have set forth above have been cited with approval in numerous subsequent cases, not always on the precise point involved here, but none of these cases have ever been overruled, either directly or by implica-

tion, the practice in this state being to expressly overrule cases where the principles announced are departed from. Some of these cases are cited in the following cases:

Hart vs. Bloomfield, 66 Miss., decided in 1888, at page 106.

Wilkinson vs. Hiller, 71 Miss., decided in 1893, at page 697.

Jones vs. Rogers, 85 Miss., decided in 1904, at page 826.

In addition to this, this statute has appeared unchanged in six published Codes of the State of Mississippi, beginning with Hutchinson's Code of 1848, Section 773, Code of 1857, page 541; Code of 1871, Section 975; Code of 1886, Section 1833; Code of 1892, Section 500; Code of 1906, Section 550. Therefore, under a familiar rule of construction these statutes have been enacted as incorporating the construction put upon it by the several decisions above referred to.

It was held in the case of Huntington vs. Allen, *supra*, at 662, as follows:

> "The terms used in the statute, expressive of the scope of the jurisdiction, viz.: 'cloud,' 'doubt,' 'suspicion,' quite distinctly imply that the instrument which created them is apparent rather than 'real;' is 'semblance' rather than substance; obscures rather than destroys or defeats."

In other words, it must be more than a mere nullity on its face. It must cast a *shadow*, a *doubt*, a *suspicion* or *cloud*, and, of course, this rule would apply where the bill claims, either directly or by necessary implication, that the instrument is void on its face, or where the instrument itself made a party of the bill is void on its face.

The enlargement of the jurisdiction of the state court referred to in the various decisions was not intended to do away with the rule so well settled, but the enlargement consisted of *(a)* allowing the real owners not in possession to file a bill to remove cloud: *(b)* or where the real owner is threatened to be disturbed in his possession or not, that is to say, the real owner can take the initiative although there has been no threat of disturbance; *(c)* whether the defendant be a resident of the State or not; and *(d)* in a class of cases

where the character of the defendant's claim is not known and where the owner may file a bill and compel the party asserting the claim to come into court and exhibit his claim of title in order that it may be passed upon by the court. It may be in this latter class of cases that the instrument when exhibited would be shown to be void on its face, but that does not alter the rule contended for that where the character of the claim is known and set forth in the bill, and is void on its face or claimed by the bill to be so, the court will not take jurisdiction.

In referring to this feature of the statute, the court said in the case of Cook vs. Friley, 61 Miss., 1:

> "The purpose was to give the real owner a remedy against one who asserts any claim or pretends to have any right or title to such owner's land, in analogy to the right of action by the canon law for jactitation of marriage. The real owner is entitled to protection against jactitation of title to the disparagement of his real ownership. He may bring into court one who asserts any claim or pretends to have any right or title to his land, and require him to vindicate his claim or submit to its extinguishment by decree of the court."
>
> "If the object of the bill is to cancel a particular evidence of title possessed by the defendant, it should be set forth in the bill as fully and particularly as known to the pleader,"

but it is not ground for demurrer if this is not set forth.

Counsel for the appellant cite the case of Cook vs. Friley and other cases, Mississippi, upon which we will comment later, and certain decisions of this court, in support of their contention that as the statute of Mississippi, as they claim gives jurisdiction to the court of equity to entertain a bill seeking to cancel an instrument which may be void on its face, the Federal court will take jurisdiction of the parties, although the bill does claim that the proceedings were void on their face.

Counsel cite in their brief, as sustaining their position that the Mississippi courts will entertain a bill seeking to cancel as a cloud upon title an instrument void on its face, although the instrument is set up in the bill and claimed by the bill to be void on its face, the following cases: Cook vs. Friley,

supra; Peoples Bank vs. West, 67 Miss., 729; Drysdale vs. Biloxi Canning Factory, 67 Miss., 534; Hurley vs. Mississippi Levee Commission, 76 Miss., 141; Gambrell Lbr. Co. vs. Saratoga Lbr. Co., 87 Miss., 773; Vinegar Bend Lumber Co. vs. Oak Grove R. R. Co., 89 Miss., 84. None of these cases support this position.

In the case of Peoples Bank vs. West, the proceeding was to cancel as a cloud upon the complainant's title a sheriff's deed held by the plaintiff, executed in pursuance of a sale under an attachment proceeding. The deed was not attacked as being void on its face. It was apparently valid, but the proceedings in the attachment suit were set up as showing that the sale was void for certain defects in the attachment proceedings, but these attachment proceedings are not a part of the deed, nor the deed a part of the attachment proceedings, but the attachment proceedings were evidence outside of the deed showing irregularities which rendered the deed void.

The same applies to the case of the Drysdale vs. Biloxi Canning Factory, 67 Miss., 534.

The case of Hurley vs. Board of Mississippi Levee Commission, 76 Miss., 141, does not touch the question. That was a bill filed to enjoin certain proceedings for the condemnation of land for levee purposes. It was a proceeding to restrain the parties from proceeding with the condemnation upon the ground that one of the commissioners was without right to the office. The proceeding was attacked *in fieri*, and the bill was in no sense a bill to remove cloud, and all that the court held was that the court of equity would entertain a bill under the circumstances to restrain the proceeding.

In the case of Gambrell Lumber Company vs. Saratoga Lumber Company, 87 Miss., 773, merely holds under the authority of Cook vs. Friley, *supra*, that a suit might be brought under the statute to cancel and remove a cloud upon any void title to land, whether such cloud be cast upon the perfect title by recorded instrument or by mere assertion of unknown but hostile claim; but the case goes further to hold that where there is a distinct admission of deraignment of title from a common source, such admission necessarily conveys the idea that complainant is advised of the nature and character of the adverse claim asserted by the defendant. In such state of

case, if the claim be a particular muniment of title, it must be specifically referred to.

Vinegar Bend Lumber Company vs. Oak Grove Railroad Company, 89 Miss., 84, does not touch the question here. That case merely holds that neither the eminent domain court nor the circuit court can consider the question as to whether condemnation is for a public use or a private use; that such questions must be determined in a court of equity by appropriate proceedings; that the eminent domain court and the circuit court are confined to the question of compensation.

On page 33 of their brief, counsel say:

> "It follows that under the influence of the Mississippi statute an instrument void on its face or a mere claim that could not be enforced in any court may be annulled and canceled as a cloud upon the owner's title; and when under the statute of a state a property owner has the right to resort to a state court of equity to cancel an instrument which is void upon its face, he also has the right to resort to the Federal Court of Equity for the same purpose if the other *jurisdictional elements are present.*"

In support of this position, counsel cite the following Federal cases: Reynolds vs. Crawfordsville Bank, 112 U. S., 405; Chapman vs. Brewer, 114 U. S., 158; Moore vs. Steinbach, 127 U. S., 70; Cowley vs. Northern Pacific Railroad Co., 159 U. S., 583; Devine vs. Los Angeles, 202 U. S., 333.

Now we concede that it is settled that under a certain stated case the courts of the United States sitting in Equity will proceed to grant relief in cases where the relief is afforded by the state statutes. It will be found, however, in examining the Federal cases cited by counsel bearing on this point that they are all cases in which the requisite jurisdictional grounds existed independently of the state statute. In other words, none of them were proceedings under Section 57 of the Judicial Code, or Sec. 8 of the Act of March 3rd, 1875, in which local jurisdiction is conferred upon the Federal Courts in a certain class of cases set forth in the statute. For instance, the case of Reynolds vs. Crawfordsville Bank, from which counsel quote, was a case in which the court had jurisdiction of the parties, and among other things the bill asked that a certain instrument be can-

celed as a cloud upon complainant's title. It was insisted, however, that courts of equity do not entertain jurisdiction to quiet title or remove a cloud therefrom when the instrument constituting the cloud *is void on its face*, or when, in order to enforce it, evidence which will inevitably show its invalidity and destroy its efficacy, must be offered. In answer to this, it was urged that as the state statutes of Indiana conferred jurisdiction in such cases, or gave the right to proceed in equity in such cases, that the Federal Courts would entertain such a bill. The court said on page 410 :

> "The appellant next complains of the decree rendered by the circuit court, and his first objection is, that the court has no jurisdiction to quiet the title of the appellee as against a deed averred by the bill and not denied by the answer to be void on its face. The contention is that a deed, void on its face, is not a cloud upon the title, and a claim of title under it is no ground for the interference of a court of equity. 'It may be conceded,' says the court, '*that the legislature of the state cannot directly enlarge the equitable jurisdiction of the Circuit Courts of the United States. Nevertheless, an enlargement of equitable rights* may be administered by the circuits courts as well as by the courts of the states. Case of Broderick's Will, 21 Wall., 520. And although a state law cannot give jurisdiction to any Federal Court, *yet it may give a substantial right, of such a character that when there is no impediment arising from the residence of the parties*, the right may be enforced in the proper Federal tribunal, whether it be a court of equity, admiralty or of common law. *Ex parte* McNeil, 13 Wall., 243."

Now, the very point which we are urging in this case is that there is an impediment arising from the residence of the parties (Record, p. 36). The attempt in the case at bar is to give the Federal Court jurisdiction of the parties to localize the action by virtue of certain provisions of the state statute, which provisions are not recognized as affording grounds for jurisdiction in the Federal Court. The very gist of the case here is that the court did not have jurisdiction of the parties. The impediment here, to the court's taking jurisdiction arises from the residence of the

parties, one being a citizen of the State of New York, and the other a citizen of the State of Kentucky and the State Statute cannot be looked to to determine the jurisdiction.

The case of Chapman vs. Brewer was a bankruptcy proceeding began in the District Court for the Western District of Michigan, a matter clearly within the jurisdiction of the court.

The case of More vs. Steinbach, 127 U. S., 70, was a suit brought in the Circuit Court of the United States for the District of California. The *defendants* were all residents of the State of California. One of the plaintiffs was an alien, and the other was a citizen of the State of New York, it was therefore a case in which the requisite diverse citizenship existed. The court, having jurisdiction of the parties to begin with, preceded to enforce a right given by the local laws of California and relied upon the cases of Reynolds vs. Crawfordsville Bank, and Chapman vs. Brewer, *supra.*

The case of Cowley vs. Northern Pacific Railroad Company, 159 U. S., 583, was a case removed from the state court to the Circuit Court of the United States for the District of Washington, and it was there held on authority of Reynolds vs. First National Bank of Crawfordsville, and other similar cases, that the Federal Court could administer a right given by the territorial statute. And that the party removing the cause to the Federal Court could not there object to the jurisdiction of the court.

The case of Devine vs. Los Angeles, 202 U. S., 333, is a distinct authority for the position which we assume here. It was claimed in that case, among other things, that the proceeding was one to remove cloud upon title. There was no diversity of citizenship, and it was further insisted that the suit arose under the constitution, laws and treaties of the United States, and it was contended that the Federal Court had jurisdiction of the case upon this ground. The court held that it could not take jurisdiction of the case as one to remove cloud upon title because the court of equity would not entertain a bill to remove as *clouds claims and threats and mere verbal assertions of ownership*, and further that a bill would not lie "invoking the equity interposition on the ground of removal of clouds, that decrees may be sought *adjudging statutes unconstitutional.*"

The court said :

> "If it were true that the statutes and charters referred to in the bill were unconstitutional as alleged, they *were void on their face, and could not constitute a cloud upon complainant's title.*"

The bill was dismissed for want of jurisdiction, but the court referred to the case of Boston & M. Consol. Copper &c. Co. vs. Montana Ore &c. Co., 188 U. S., 632, as stating the rule recognized by the usual chancery practice relating to bills quieting title to lands as prevails in the Federal Courts, and we refer this court to that case.

All of the Federal cases referred to by counsel as sustaining their position that the bill should be entertained because jurisdiction to entertain such a bill was conferred by the state statutes are cases in which the court had jurisdiction of the parties either by removal or upon the requisite diverse citizenship. In other words, that the court having obtained jurisdiction upon other grounds simply proceeded to administer the relief which was afforded by statute of the state in which the court was sitting.

In the case of Boston & M. Consol. &c. Co. vs. Montana Ore &c. Co., *supra*, the court referred to the case of Whitehead vs. Shattuck, 138 U. S., 146. In that case the court said, referring to the right of the party out of possession to maintain a bill to remove cloud :

> "Nor can the case of Reynolds vs. Crawfordsville First National Bank be deemed to sustain the plaintiff's contention ; it was there only held that the legislature of the state may be looked to in order to ascertain what constitute a cloud upon title, and that such cloud could be removed by a Court of the United States sitting in equity in a *suit between the proper parties.* Nothing was intended at variance with the law of Congress, excluding the jurisdiction of a court of equity where there was a full remedy at law."

In the case of Holland vs. Challen, 110 U. S., at page 21, the court said that a Federal Court having jurisdiction by adverse citizenship may administer relief under a state

statute permitting a suit to quiet title by one out of possession, although the plaintiff's title had not been established by law as would have been necessary but for the statute, although the ejectment was not maintainable since the property was unoccupied.

This case has been frequently cited; in fact, it seems to have been cited in all cases referred to by counsel, and in the cases which we have cited. In other words, all of the cases which we have been able to find in which the Federal Courts have undertaken to administer relief granted by the state statute are cases in which the court had acquired jurisdiction and of the parties, on other grounds, cases in which the court had the original jurisdiction and in which it was asked to administer certain relief afforded by the state statute.

In the case at bar, it is sought to give the Federal Court *original jurisdiction* by reasons of the provisions of a state statute enlarging the jurisdiction of the *state* court. This is not warranted by any decision of the Supreme Court of the United States which we have been able to find, in fact, the settled rule is to the contrary. The cases in which the Federal Court has original jurisdiction are those distinctly pointed out by Federal statute, and one class of cases is that dependent upon diverse citizenship, and the rule as to diverse citizenship is fixed by the statute, Section 51 Judicial Code. The proceeding in the case at bar was instituted under a Federal statute which applies to an exceptional class of cases where the jurisdiction is determined by the location of the property affected and not by the residence of the parties, and one of the class of cases in which jurisdiction was conferred without reference to the residence of the parties was where the proceeding was to remove *cloud upon title*. What constitutes *cloud upon title within the meaning of the Federal statute*, which will give a Federal Court original jurisdiction, must be determined with reference to the meaning of the term established by the general principles of Equity Jurisprudence which pertain in the Federal Courts. Nothing is better settled than the rule that a Federal Court will not entertain jurisdiction of a bill claimed to be a bill to remove cloud where the instrument attacked is shown by the bill, or by the instrument itself, to be void on its face. We must take

it that the term " bills to remove clouds," as used in the Federal statute, means clouds as recognized by the Federal Courts, and that its jurisdiction will be confined to such cases and cannot be enlarged by State statutes which give state courts jurisdiction to entertain suits or to afford relief in cases which do not meet the requirements as settled by the general rules of equity jurisprudence which prevail in the Federal courts (see cases cited (*ante*, p. 2).

Conferring jurisdiction upon the Federal court is one thing, while the Federal court administering certain relief in cases where it has jurisdiction is quite another. The bill in this case cannot be maintained unless it is held that the state statute has enlarged *original jurisdiction* upon the Federal court to the same extent that the jurisdiction of the state court was enlarged. The Federal court as such has jurisdiction of bills to *remove clouds from title*, that, however, as we have stated before, is determined not by any state statute but by the general rules of equity jurisprudence and Federal statutes. Under the state statute the state court has jurisdiction in cases where the owner of the property is out of possession, the Federal court has not. Whitehead vs. Shattuck, 138 U. S., at page 146. Under the state statute the state court has jurisdiction of a bill where the adverse claim consists of threats or mere verbal assertions of ownership, the Federal court has not. Devine vs. Los Angeles, 202, U. S., at page 335. Under the state statute, if claim of counsel is correct, the state court can entertain a bill to cancel as clouds upon title an instrument void upon its face, the Federal court cannot. Devine vs. Los Angeles, *supra*. See also, 5 Peters, 95; Ewing vs. St. Louis, 5 Wall., 413; Hennewinckle vs. Georgetown, 15 Wall., 547; Phelps vs. Harris, 101 U. S., 370; Mackall vs. Casilear, 137 U. S., 556; Lyon vs. Alley, 130 U. S., 177.

As we have said before, that while it was alleged that the pleading was to remove cloud upon title, yet all of the grounds set up showed that the proceeding attacked in this case were void on their face, if void at all.

We have shown in the preceding part of our brief that the record of the proceedings, including the judgment, is an entirety, and must be looked at as a whole. The records of the proceedings are made exhibits to the bill of complaint,

some parts of them incorporated in the bill itself. The contentions of the appellant are:

FIRST. That the eminent domain court had no jurisdiction because the clerk's appointment by the justice of the peace who was to preside at the eminent domain court was not indorsed upon the application presented to the clerk (Transcript, page 10).

This is a matter which appears upon the face of the record.

SECOND. That the appointment in two cases was made by deputy clerks, and not the regular clerks (Transcript, page 11).

THIRD. That the laws of the State of Mississippi giving the right of condemnation to telegraph companies did not give the right to condemn property already devoted to a public use (Transcript, page 11).

This point also arises on the face of the proceedings.

FOURTH. That the laws of the State of Mississippi did not give the right to condemn the rights of way of railroad companies without the consent of the railroad company, and that the consent of the complainant had not been given (Transcript, page 11).

This matter also appears upon the face of the proceedings.

FIFTH. That the laws of the State of Mississippi did not give to telegraph companies the right to condemn the rights of way of railroad companies for the purpose of maintaining an existing line (Transcript, page 12).

SIXTH. It was then urged that the proceedings were void because they violated certain provisions of the Constitution of the State of Mississippi, and that chapter 43 of the Code of Mississippi on Eminent Domain, under which the proceedings were canceled, was violative of certain provisions of the Constitution of the United States, as set forth in the bill of complaint (Transcript, pp. 12-19).

All of these matters are matters arising upon the face of the proceedings. (See Devine vs. Los Angeles, *supra*).

So we feel that we are warranted in saying that the court had no jurisdiction for the reason that all of the allegations of the bill were addressed to matters apparent upon the face of the eminent domain proceedings.

As to the fifth ground, it is admitted that the statute of the state of Mississippi only gives the right to telegraph companies to condemn for "new lines," and does not give the

right to condemn for the maintainence of an existing line. It will be seen, however, from an inspection of the exhibits of the proceedings set forth in the bill of complaint that these proceedings were for condemnation for a new line. This is expressly set forth in each one of the petitions (Transcript, pp. 22, 26, 30), and the judgment confines the applicant, the Telegraph Company, to the construction of a line as prayed in the petition, and the fact that the Telegraph Company might undertake to violate the rights which it had obtained under the condemnation proceeding is a mere matter of conjecture and would not afford ground for a bill of this character. Under the Federal cases, mere verbal threats to do this or apprehension that it may be done, does not afford ground for entertaining a bill to remove cloud (See Devine vs. Los Angeles, *supra*).

The bill is in no sense a bill to remove cloud but is a bill seeking to perpetually enjoin the Telegraph Company from directing and operating a line of telegraph on the right of way of the Railroad Company. The averment that it is a bill to remove cloud is but a "mere pretext to obtain jurisdiction." What is said in the case of Devine vs. Los Angeles, *supra*, at page 335, is applicable here. The court says :

> "The test as to when a cloud is or is not cast, as stated by Mr. Justice FIELD, then chief justice of California, in Pixley vs. Huggins, 15 Cal., 127, and reasserted in Hannewinkle vs. Georgetown, 17 Wall., 547, 21 L. Ed., 231, is undoubtedly applicable and demonstrates that the assertion of unconstitutionality cannot be resorted to to maintain Federal jurisdiction as constituting a cloud. The averment of unconstitutionality in such circumstances is *a mere pretext to obtain* that jurisdiction.

The prayer of the bill is that the condemnation proceeding be held void as violative of the Fourteenth Amendment of the Constitution of the United States, as well as for other reasons assigned in the bill of complaint, and that the Telegraph Company, be "permanently enjoined" from entering upon, or taking possession of, or erecting any wires or other appliances upon the right of way, etc., after the termination by notice or otherwise of the contract under which the Telegraph Company

now occupies the right of way of its telegraph lines (See Transcript, page 20).

This is merely a proceeding for an injunction masquerading under the guise and title of a bill to remove cloud (See Ladew vs. Tennessee Copper Co., 218 U. S., 357).

On the Merits.

All the questions presented are questions of law arising on the face of the bill. The prayer is that the several condemnation proceedings be declared void for the reasons set forth in the bill and that the Telegraph Company be permanently enjoined from proceeding under them. The proceedings are claimed to be void for certain alleged irregularities therein, and also because the enforcement of them would be violative of the Fourteenth Amendment of the Constitution of the United States.

It is claimed in the bill:

1st. That the proceedings are void because the appointments of the justices of the peace were not endorsed upon the application as provided by section 1856 of the Code of 1906, but were made in writing on separate sheets and filed with the papers.

2d. That the proceedings are void because the writs and other process were issued in the two cases by deputy clerks and not by the regular clerk.

3d. The proceedings are claimed to be void because it is alleged that the right of way of the Railroad Company being properly already devoted to a public use, no authority is conferred upon the Telegraph Company to condemn property so devoted.

4th. The proceedings are claimed to be void because the Telegraph Company is only authorized to exercise the power of eminent domain for the construction of *new lines*, and that it was not the purpose of the Telegraph Company to construct new lines as alleged in its applications, and authorized by the judgment, but to maintain the existing line.

It will be seen, therefore, as we stated in the outset, that the fundamental purpose of this bill is to obtain injunctive relief by excluding the Telegraph Company entirely and per-

manently from the use of the right of way of the Railroad Company by perpetual injunction.

We will now consider certain of the objections to the proceedings set up in the bill in the order in which we have presented them, in so far as the state statute and decisions bear on them.

FIRST. As to the failure of the clerk to endorse his appointment of the justices of the peace upon the application. It will be borne in mind that it is shown by the bill that the appointment of the justices of the peace was made in writing and filed with the application. In order to fully appreciate the force of this objection, it would be well to consider the statute, chapter 43, of the Mississippi Code of 1906, under which the proceedings were instituted, and the purposes for which the eminent domain court is constituted and the scope of its power and authority.

It is perfectly manifest from the most casual reading of the statute that it was the purpose of the Legislature to divest the proceedings as far as possible of all mere technical and formal matters relating to the procedure.

In the case of Vinegar Bend Lumber Co. vs. Oak Grove, etc., Railroad Company, 89 Miss., 84, this court held that the eminent domain court exercised no judicial function whatever. Neither the justice of the peace nor the jury, nor the two together, exercised any judicial function whatever. That the sole issue which can be tried by the eminent domain court is the one of compensation, the ascertainment by the jury of the amount of damages to be awarded to the land owner in the proceeding. The justice of the peace merely assembles the jury, and presides, gives an instruction which is provided by the statute, Code of 1906, Section 1865, after the jury has heard the testimony. The jury views the premises. The form of judgment to be rendered is prescribed by statute (Section 1867, Code of 1906).

It is manifest that the sole purpose of requiring the appointment of the justice of the peace to be endorsed on the petition was to preserve a record of the appointment. The substantial requirement was the preservation of the record, and if this appointment is made in writing by the proper officer and filed with the application, it is certainly a substantial compliance with the statute. But, as we have stated in

the outset, it is manifest that the legislature did not intend, that these proceedings should be hampered by mere formalities in proceedings and mere technical objections. It is expressly provided by section 1862, of the Code of 1906, that no irregularities in drawing, summoning, or empaneling the jury shall vitiate the verdict or judgment. The form of the verdict is prescribed (section 1866, Code of 1906), and it is provided that any informal or unsigned verdict may be amended. It is provided further (section 1871, Code of 1906), that if the defendant or land owner shall appeal, the appeal shall not operate as a supersedeas, nor shall the right of the applicant to enter in and upon the land and appropriate the same to the *public use be delayed*. In other words, the whole spirit of the statute is that the proceedings shall not be delayed nor hampered nor trammelled by mere technical objections, mere matters of form and procedure, and that no judgment or verdict rendered shall be vitiated by mere irregularities in the proceedings. In other words, the rule as to literal compliance does not apply under this statute.

It must be assumed that all of the proceedings, except in the two particulars set out in the bill—that is to say, the point under consideration and the second point, that the deputy clerk instead of the regular clerk issued the writ and made appointment—were regular in all substantial particulars. That is to say, that the Railroad Company was duly notified, that the court was duly assembled, that the justice of the peace was a regular and competent justice of the peace, that the parties duly appeared, that the testimony was taken, the jury instructed, the premises viewed, and the verdict for the damages rendered as prescribed by the statute. We say this must be assumed, because no objection whatever is raised in the bill to any of the proceedings except in the particulars above named. No complaint is made of the award, no appeal was taken to the circuit court, where the matter could be tried *de novo* had the Railroad Company been dissatisfied with the award and where any irregularity affecting this award would have been cured, but the Railroad Company deliberately abandoned its right to the appeal and raised these technical objections to the proceeding by a bill in equity seeking an injunction. The statute provides that either party may appeal to the cir-

cuit court. If the land owner is dissatisfied with the award, an appeal may be taken to the circuit court and there the whole matter be tried *de novo* as other issues are tried in that court, and all of the rights of the land owner affected by the issue which that court can try, that is to say, in the matter of proper compensation, will be fully guarded by the instructions of a court possessing full judicial power. The remedy as to the award is adequate and complete.

Even in Eminent Domain statutes which are not expressly to be liberally construed, in matters of form and procedure, as our statute is, it is held that a substantial compliance with the statute is all that is required. (See Lewis on Eminent Domain (3 Ed.), 1077; 24 Wendell, 367; 45 Hun, 310.)

The Railroad Company was in no way prejudicially affected by the fact that the clerk made the appointment of the justices of the peace in writing on a sheet of paper separate from the application, and did not endorse it upon the application itself. The appointment was in writing and preservation of a record of the same being the substantial matter, the requirement or provision as to this record being made or endorsed upon the application was merely directory.

Counsel will doubtless cite numerous cases to the effect that statutes providing for the power of eminent domain must be strictly construed. We are fully aware of the general rule, but this rule of strict construction has its limitations, and the Court must necessarily consider it in the light of the terms of the Mississippi statute and its manifest spirit and purpose. It is thoroughly settled in the Vinegar Bend Lumber Company Case, above referred to, that the substantial constitutional rights of the land owner can be fully protected by resort to a bill in equity, but no substantial or constitutional right of the complainant is shown to be violated by the manner in which the clerks made their records of the appointments of the justices of the peace to act in these cases.

Furthermore, although we deem it entirely unnecessary, for it to have been done, in two of the cases, as shown by the bill, the endorsements were made upon the application and new writs issued. This, however, we consider to be wholly unnecessary. The statute had been substantially complied with.

Counsel insists, on page 47 of the brief, that the rule is

that all *material requirements* must be literally complied with and such compliance must appear on the face of the record. We do not concede that the endorsement of the appointment of the justices of the peace on the petition itself is a material requirement. The material requirement is making a record of the appointment and that the justices of the peace were appointed and appointed in writing appears on the face of the record. Counsel cite two Mississippi cases. Each of these cases, however, were condemnation proceedings instituted under the special charter of railroad companies granted before the adoption of chapter 43 of the Code of Mississippi of 1906, the proceedings themselves having been had before the adoption of this general law.

The first of the cases cited is that of White vs. Memphis &c. Railroad Co., 64 Miss., 566. In that case the charter of the railroad company provided that if condemnation proceedings became necessary, application could be made to a justice of the peace who should issue his warrant to the sheriff requiring him to summons a jury of twelve *disinterested freeholders* of the county to assess the value of the land. It was held under this provision if the record of the condemnation proceedings showed that award was made by "twelve persons" without showing that they were "disinterested freeholders" the award would be void and might be treated as a nullity, even in a collateral proceeding. In other words, the court held that the requirement as to disinterested freeholders was a substantial and material jurisdictional fact and that compliance with it must appear on the face of the record of the proceeding. Madden vs. Railroad Co., 66 Miss.

The other case cited was a similar holding, the proceeding being instituted under the special charter of the Railroad Company, the court holding that the requirement in the charter that appraisement should be by "disinterested commissioners" was material, and it was necessary that the record should show that it was made by "disinterested" commissioners; that these were essential jurisdictional facts. Of course, it needs no argument to show that the parties making the award should be disinterested; this is a very material matter and a very different matter from the mere manner of the appointment of the justices of the peace under the Code,

chapter 43, the justices of the peace having nothing whatever to do with making the award, their only function being that of a ministerial officer to preside at the meeting. He did not participate in any way in the award. The chapter 43 of the Code of Mississippi of 1906 was drawn for the purpose of simplifying eminent domain proceedings, prescribing the mode of exercising the right of eminent domain by a general law applicable in all cases, and it was the manifest purpose of the legislature to divest these proceedings of any mere technical and formal objections,—that is perfectly evident on the face of the statute.

SECOND. The second objection to the proceedings is equally without merit, it is urged that the letter of the statute required the application to be presented to the clerk of the circuit court of the county, and that the clerk shall issue the writ, etc., and because in two of the cases, the writs, etc., being issued by the deputy clerks, were void and vitiated the whole proceeding.

Section 1006, Code of 1906, provides for the appointment of deputy clerks in the Supreme, chancery, and circuit courts, "who shall take the oath of office, and who shall, thereupon, have the power to do and perform all of the acts and duties which their principals may do and perform."

We take it for granted that counsel will not contend that the deputy clerks who signed the papers were not in fact deputy clerks, or that it was necessary for the Telegraph Company to show that they were. Their right to act as deputy clerks is not questioned, and we think on this point a mere citation of the section of the Code last above referred to is a complete answer to this objection.

None of the authorities cited by counsel on this point sustain his proposition. The powers conferred upon deputy clerks by the Mississippi statute are broad and comprehensive. The deputy clerks have power by virtue of the statute to do and perform all of the acts and duties performed by their principals. The rights of deputy clerks in Mississippi to perform the functions which they did perform in these cases has never been questioned. They stand in the place of their principals in all matters in which the principal can act. The duties are not devolved upon the deputies by the principal, but they are devolved upon the deputies by the language of

the statute and this is a test which underlies all of the cases cited by counsel. The case of Sullivan vs. Railroad Co., 85 Miss., cited by counsel on page 8 of the brief, does not touch the question here involved.

THIRD. The third point is that the Telegraph Company did not have the power or authority to condemn the railroad right of way because it was property already devoted to the public use.

We submit that the right of the Telegraph Company to condemn the rights of way of railroad companies in the State of Mississippi is conclusively settled in the case of Cumberland Tel. & Tel. Co. vs. Y. and M. V. R. R. Co., 90 Miss., 686, in which case this question was most elaborately considered. It was urged in that case that the Telephone Company which was the party there seeking to condemn did not have the right or power to condemn the right of way of the Railroad Company longitudinally, but could only condemn a right of way across the railroad. The court in an elaborate opinion held that section 925 in connection with section 929 of the Code of 1906 gave power to foreign *telegraph* and telephone companies to condemn rights of ways of railroad companies in Mississippi, and this settled that question so far as this case is concerned, and we deem it unnecessary to discuss this feature of the case further. We have no reason to suppose that the decision in that case will be overruled and, unless overruled, it is the law of this case so far as this point is concerned.

FOURTH. It is claimed that the judgments are void and should be canceled as a cloud upon complainant's title because the statutes of this State only authorize telegraph companies to exercise the power of eminent domain for the purpose of constructing *new lines*, and that in fact it is not the purpose of the Telegraph Company to construct new lines as alleged in its applications and authorized by the judgments, but to attempt to maintain existing lines.

By what process of reasoning the complainant arrives at the conclusion that the proceedings are void because the Telegraph Company might undertake to do something which was not authorized by them, we must confess we are unable to understand. The validity of the proceedings is one thing, what the Telegraph Company might undertake to do under them is quite another thing. The court will see that the pro-

ceedings are incorporated in the bill and the applications are filed as exhibits to the bill and made parts thereof. For the applications see pages 32 to 58 of the transcript. The court will see that these applications contain stipulations as to what the Telegraph Company proposed to do, the character of the line to be constructed, and the manner in which it is to be constructed all of which is set forth in detail in each of the applications. The court will, also, see that in each of the applications this language is used, "The said line of poles, crossarms, and wires to be constructed and for which this condemnation is sought, *being a new line*." With each of these applications a blue print was filed showing and delineating the route and made a part of the application. The applications in these cases were very carefully drawn so as to conform with the law as set forth in the statates, and to meet all of the requirements of the statutes, and also in the light of many adjudicated cases. It will be seen that the judgments all provide that the said lines shall be constructed in the manner and with all the safeguards set forth in the petition.

In the case of M. & O. R. R. Co. vs. Postal Tel. Co., 76 Miss., 731, the Mississippi court held at pages 752 and 753, that these stipulations contained in the application were valid and enforceable.

By the chapter on Eminent Domain, section 1872, of the Code of 1906, the whole record is required to be filed in the office of the clerk of the circuit court and remain there as a record thereof, and as such subject to be filed by any person interested and recorded in the records of the deeds of the county. In other words, the application together with all of the proceedings, down to and including the judgment, constitutes the title of the party condemning, and is the charter of its rights, defining and limiting them, and it is to this the court must look in determining whether the proceedings are valid or invalid, and not to any mere allegation in the bill as to what might be done by the Telegraph Company. In other words, in determining the question here as to whether or not the proceedings are void, the court must look to the proceedings themselves which were made parts of the bill, and these proceedings as set forth must control. This is a universal rule of law (See 16 Cyc., 236, 237; Ency. Pl. & Pr., Vol. 8, p. 741, note 1; Frieberg vs. Magold, 70 Tex., 116; 1st Beach on

Equity Proceeding & Practice, 229; 31 Miss., 63; 64 Ill., App., 239; 30 Ill., App., 17; 97 Md., 725; 40 W. Va., 553; 122 Fed., 363).

It must be carefully borne in mind that the bill is an attack on the proceedings themselves, as being void for the reasons set forth in the bill, as clouds upon plaintiff's title, and this court will certainly not declare the proceedings void upon the ground that the Telegraph Company might undertake to do something which would be violative of the stipulations in the petitions, and violative of the rights conferred by the judgments and unauthorized by them, and unauthorized by the law.

It is true, that one witness did testify in one of the cases, that the Telegraph Company did want to maintain the old line, but certainly under the proceedings, as set forth in this record, no such right was conferred. The complainant might as well say that the proceedings were void because the Telegraph Company did not intend to construct its lines in accordance with any other stipulation in the application, or to violate the law in any other respect; that the proceedings must be held to be void because the Telegraph Company intends to erect its poles in such manner as to endanger the property of the Railroad Company, or to interfere with the running of its trains, or that it did not intend to remove its poles if at any time it became necessary for the Railroad to occupy the space occupied by the Telegraph Company as stipulated in the applications. These are matters which are altogether outside of the question as to the validity of the proceedings themselves, and should the Telegraph Company undertake to violate the stipulations, the Railroad Company would have its complete and adequate remedy.

What the Telegraph Company might want to do under the proceeding and what it is authorized by law to do, are entirely different things and depend upon different considerations.

The court must look to the applications and to the judgments which were rendered to determine their validity and can not consider the conjectures of the complainant as to what might be done by the Telegraph Company in violation of the right conferred.

In considering the matter of anticipating, or taking into consideration by way of anticipation, in the condemnation

proceedings the suggestion that the Telegraph Company might act in violation of law, or the rights conferred by the proceedings or in violation of the stipulations upon which the condemnation proceedings are had, we direct the court's attention to the following cases, which will be found instructive:

Mobile & Ohio R. R. Co. vs. Postal Tel. Co., 76 Miss., 739.

Postal Tel. Co. vs. Oregon Railroad Co., 23 Utah, 474.

Mobile & Ohio R. R. Co. vs. Postal Tel. Co., 120 Ala., 474.

Mobile & Ohio R. R. Co. vs. Postal Tel. Co., 101 Tenn., 62.

Atlantic Railroad Co. vs. Postal Tel. Co., 120 Ga., 269-280.

St. Louis R. R. Co. vs. Postal Tel. Co., 173 Ill., 508.

Postal Tel. Co. vs. Louisiana Western R. R. Co., 49 La. Ann., 1270.

Chicago R. R. Co. vs. Chicago, 166 U. S., 226.

Georgia R. R. Co. vs. Postal Tel. Co., 152 Fed., 991.

The general rule is laid down in 15 Cyc., 728, as follows:

"In proceedings to condemn land, or to obtain compensation for land already taken or injured, damages are assessed upon the theory of a lawful taking and a proper construction and operation of the improvement in question. No damages are included except as will necessarily arise in the proper construction and operation of the work. Anticipated or past negligence in the construction of the improvement is not, therefore, an element of damage, and the same is true where the completed improvement is maintained and operated in a negligent manner, or so as to constitute a nuisance. So in such a proceeding there can be no recovery for an original wrongful entry, nor for trespasses committed in constructing the improvement. The remedy of the land owner in such cases is a common-law action for damages. The rules stated in this section are strictly applicable, although the Constitution provides that compensation shall be made for injuring or destroying property as well as for taking it, and they also apply under statutes providing not only that just compensation for the land shall be made, but likewise for incidental loss or damage

such as must necessarily or reasonably result from the appropriation of the land and construction of the road." See, also, Davis vs. Y. & M. V. R. R. Co., 73 Miss., 678.

The purpose of citing these cases and the rule from Cyc. is to make it clear that in condemnation cases the presumption is that those things alone will be done which are lawful to be done and permissible under the applications and judgments rendered and the proceedings cannot be delayed or thwarted by conjectures or suggestions that the condemning party will act in an illegal manner, will not act in accordance with the terms of the judgment or the stipulations contained in the applications.

Redress for all of these matters is ample should the occasion arise.

The rules which we have set forth are of universal application, and if these matters cannot be considered in a condemnation proceeding, certainly the court would not hold the judgment void because the land owner suggested that the plaintiff in the condemnation proceeding would not abide by its terms.

It is settled in Mississippi that equity will not relieve if the "injury complained of is doubtful, eventful or contingent." Freen vs. Lake, 54 Miss., at page 546. "It is not enough to show probable or contingent injury, but it must be shown to be inevitable and undoubted." CAMPBELL, J., in McCutchen vs. Blanton, 59 Miss., 122.

It is urged that the judgments are void because by reasons of the provision of the chapter on Eminent Domain, as construed by the Mississippi court, the Railroad Company is deprived of its property without due process of law, and denied the equal protection of the law for the reasons:

FIRST. Because in the eminent domain proceedings the Railroad Company was not afforded an opportunity to be heard as to whether the use for which the property was proposed to be taken is a public use.

SECOND. As to whether the purpose for which the said property is purported to have been condemned is for the erection of a new line, or only for the maintenance of an existing line.

THIRD. As to whether said line is constructed so as not to be dangerous to persons or property, and so as not to interfere with the convenience of the complainant.

That for these reasons chapter 43, Code, 1906, is in violation of the Fourteenth Amendment of the Constitution of the United States, and that said judgments should be canceled and annulled, and decreed to be of no force and effect.

In regard to the first reason assigned, it is sufficient to say that no issue is raised in the bill, no denial is made, and none could be successfully made or fairly made, that the use for which the right of way is condemned was for a public use. In the case of Vinegar Bend Lumber Co. vs. Oak Grove Railroad Co., *supra*, the Mississippi court has passed upon this subject, for in that case the very question mooted was that the proposed condemnation proceeding was not for a public use, and this court held that while it is true that question being a judicial question could not be determined by a court of eminent domain, or in the circuit court on appeal, still it could be considered and determined through the chancery court, and that all constitutional rights of the property owner were fully protected in this respect. The bill does not charge that the condemnation was for a private and not a public use, but merely complains that that question could not be raised in the eminent domain court.

What has been said in answer to the *first* ground of objection, applied equally to the *second*. That is to say, conceding that the question as to whether condemnation proceedings were in fact for the maintenance of the old line, and not for the construction of a new line, could not be considered in the eminent domain court, no constitutional right of the complainant was violated or infringed, and should the Telegraph Company undertake to do what it has no right to do under the condemnation proceedings, and under the laws of the state, it is perfectly manifest that the Railroad Company has its full, complete and adequate remedy, either by proper bill in equity, or by an action at law for damages. The Telegraph Company would be a trespasser, and its poles and wires could be removed from the right of way either under judicial process, or by the act of the Railroad Company itself, as was done in the Pennsylvania case, *supra*. In that case, it being judicially determined that the Telegraph Com-

pany had no right to maintain its poles and wires upon the right of way, they were cut down by the railroad company and removed.

It has heretofore been shown that the possibility that the Telegraph Company might violate the law and the terms under which it acquires the right to condemn, are contingent, remote and eventual, and not proper matters for consideration in condemnation proceedings.

THIRD. As to the third ground, it is amply settled by both the decisions of the Mississippi Court in the case of M. & O. R. R. Co. vs. Postal Tel. Co., 76 Miss., 731, and the quotation from 15 Cyc. *supra*, and the other authorities cited, that the claim that the Telegraph Company might erect its lines so as to violate the terms of its stipulations, or the statute under which it proceeds, by improper construction of its lines, are matters not to be considered in a condemnation proceeding, but should these conditions arise, the Railroad Company has its complete and adequate remedy by an action for damages. In other words, there is nothing in the contention that any constitutional right of the complainant is infringed by the proceedings, themselves, or by the statute which authorizes them. The proceeding in the eminent domain court it is true is a summary proceeding, but it is a proceeding for the determination of one matter only, and that is the amount of compensation, and no complaint is made on that score. All substantial rights of the complainant are fully preserved to it, and can be asserted in proper proceedings, full and equal protection of the law is afforded complainant.

We respectfully submit that there is absolutely no merit in any of the contentions set up in the bill, and that the decree of the court below dismissing the bill should be affirmed.

Respectfully submitted,

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